

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 WAYNE YOSHIMOTO, )  
4 )  
5 Plaintiff, )  
6 vs. )  
7 SAFECO INSURANCE COMPANY OF )  
8 ILLINOIS, )  
9 Defendant. )

Case No.: 2:17-cv-00382-GMN-CWH

ORDER

10 Pending before the Court is the Motion for Partial Summary Judgment, (ECF No. 21),  
11 filed by Defendant Safeco Insurance Company of Illinois (“Defendant”). Plaintiff Wayne  
12 Yoshimoto (“Plaintiff”) filed a Response, (ECF No. 22), and Defendant filed a Reply, (ECF  
13 No. 24). For the reasons discussed herein, Defendant’s Motion for Partial Summary Judgment  
14 is **GRANTED**.

15 **I. BACKGROUND**

16 This case arises out of allegations that Defendant, a national insurance company, failed  
17 to properly pay insurance benefits to Plaintiff following a traffic collision. (Am. Compl. ¶ 17,  
18 ECF No. 18). The collision in question occurred on September 12, 2013, when a vehicle  
19 operated by Gang Sun (“Mr. Sun”) allegedly struck Plaintiff’s vehicle as he was backing out of  
20 a parking space. (Id. ¶ 8); (Pl.’s Dep. 19:17–19, Ex. 14 to Def.’s MSJ, ECF No. 21-14). As a  
21 result of the incident, Plaintiff claims to have suffered physical injuries, mental injuries,  
22 disability, and medical expenses. (Am. Compl. ¶¶ 10-11). Based on these injuries, Mr. Sun  
23 compensated Plaintiff with his liability insurance policy limits of \$15,000.00. (See  
24 Correspondence, Ex. 4 to Def.’s MSJ, ECF No. 21-4). In addition, Defendant compensated  
25 Plaintiff with \$5,000.00 for medical expenses. (Payments Summary, Ex. 5 to Def.’s MSJ, ECF

1 No. 21-5). Plaintiff contends that these payments did not cover the full extent of damages  
2 incurred. (Am. Compl. ¶¶ 13, 22).

3 In May 2016, Plaintiff made a claim for underinsured motorist coverage (“UIM”) with  
4 Defendant in accordance with the parties’ automobile insurance policy (“the Policy”). (Id. ¶  
5 16); (Correspondence, Ex. 4 to Def.’s MSJ). The policy set UIM coverage limits at \$100,000  
6 per person and \$300,000 per accident. (Policy at 9, Ex. 13 to Def.’s MSJ, ECF No. 21-13). On  
7 June 2, 2016, Defendant responded to Plaintiff with its evaluation that Plaintiff had already  
8 been fully compensated for his injuries. (See Safeco’s Resp., Ex. 6 to Def.’s MSJ, ECF No. 21-  
9 6). According to Defendant, this response was based upon the results of an independent  
10 medical examination and records review by orthopedic surgeon Aubrey Swartz, M.D., which  
11 found that Plaintiff’s injuries “would have resolved within 3 weeks maximum.” (See Swartz  
12 Report, Ex. 7 to Def.’s MSJ, ECF No. 21-7).

13 Based on Defendant’s failure to pay the UIM policy limits, Plaintiff filed an Amended  
14 Complaint on October 13, 2017, alleging three causes of action: (1) Breach of Contract; (2)  
15 Violation of the Nevada Unfair Claims Practices Act; and (3) Breach of the Covenant of Good  
16 Faith and Fair Dealing/Bad Faith. (Am. Compl. ¶¶ 19–37). On December 6, 2017, Defendant  
17 filed the instant Motion for Partial Summary Judgement. (ECF No. 21).

## 18 **II. LEGAL STANDARD**

19 The Federal Rules of Civil Procedure provide for summary adjudication when the  
20 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
21 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant  
22 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that  
23 may affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
24 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable  
25 jury to return a verdict for the nonmoving party. See *id.* “Summary judgment is inappropriate if

1 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict  
2 in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th  
3 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A  
4 principal purpose of summary judgment is "to isolate and dispose of factually unsupported  
5 claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

6 In determining summary judgment, a court applies a burden-shifting analysis. "When  
7 the party moving for summary judgment would bear the burden of proof at trial, it must come  
8 forward with evidence which would entitle it to a directed verdict if the evidence went  
9 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing  
10 the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp.*  
11 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In  
12 contrast, when the nonmoving party bears the burden of proving the claim or defense, the  
13 moving party can meet its burden in two ways: (1) by presenting evidence to negate an  
14 essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving  
15 party failed to make a showing sufficient to establish an element essential to that party's case  
16 on which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–  
17 24. If the moving party fails to meet its initial burden, summary judgment must be denied and  
18 the court need not consider the nonmoving party's evidence. See *Adickes v. S.H. Kress & Co.*,  
19 398 U.S. 144, 159–60 (1970).

20 If the moving party satisfies its initial burden, the burden then shifts to the opposing  
21 party to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v.*  
22 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,  
23 the opposing party need not establish a material issue of fact conclusively in its favor. It is  
24 sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the  
25 parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*

1 *Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid  
2 summary judgment by relying solely on conclusory allegations that are unsupported by factual  
3 data. See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go  
4 beyond the assertions and allegations of the pleadings and set forth specific facts by producing  
5 competent evidence that shows a genuine issue for trial. See *Celotex Corp.*, 477 U.S. at 324.

6 At summary judgment, a court's function is not to weigh the evidence and determine the  
7 truth but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249.  
8 The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn  
9 in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is  
10 not significantly probative, summary judgment may be granted. See *id.* at 249–50.

### 11 **III. DISCUSSION**

12 In the instant Motion, Defendant moves for partial summary judgment on Plaintiff's  
13 claims for: (1) Breach of the Covenant of Good Faith and Fair Dealing/Bad Faith; and (2)  
14 Violation of the Nevada Unfair Claims Practices Act. (Def.'s MSJ 11:19–12:11, ECF No. 21).  
15 Additionally, Defendant argues that the Court should strike Plaintiff's request for punitive  
16 damages. (*Id.*). The Court addresses each issue in turn.

#### 17 **A. Breach of the Covenant of Good Faith and Fair Dealing/Bad Faith**

18 Defendant argues that Plaintiff's bad faith claim fails because "there is simply no  
19 evidence of [] knowingly unreasonable conduct" on the part of Defendant in denying Plaintiff's  
20 UIM claim. (*Id.* 13:24–14:7). A party can be liable for breach of the covenant of good faith and  
21 fair dealing "[w]hen [it] performs a contract in a manner that is unfaithful to the purpose of the  
22 contract' or otherwise acts in bad faith." *Gorrell v. State Farm Mut. Auto. Ins. Co.*, No. 2:08–  
23 CV–01757–RLH–RJJ, 2010 WL 2628651, at \*4 (D. Nev. June 28, 2010) (quoting *Hilton*  
24 *Hotels v. Butch Lewis Prods.*, 808 P.2d 919, 923 (Nev.1991)). To establish a claim for bad  
25 faith in the insurance context, a plaintiff must show: (1) an insurer's denial of (or refusal to pay)

1 an insured's claim; (2) without any reasonable basis; and (3) the insurer's knowledge or reckless  
2 disregard of the lack of a reasonable basis for its claim denial. *Sandoval v. Hartford*  
3 *Underwriters Ins. Co.*, No. 2:10–CV–1799–JCM–PAL, 2011 WL 586414, at \*2 (D. Nev. Feb.  
4 9, 2011) (citing *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co.*, 863 F.Supp. 1237, 1247  
5 (D. Nev. 1994)). An insurer is not liable for bad faith so long as it had a reasonable basis to  
6 deny coverage. *Pioneer*, 863 F.Supp. at 1249 (refusing to find bad faith where insurance  
7 company investigated damage and requested documents despite insured's argument that  
8 investigation was incomplete).

9 Plaintiff contends that the bad faith cause of action should survive because a reasonable  
10 jury could conclude that Defendant “lacked a reasonable basis to deny Plaintiff’s [UIM] claim.”  
11 (Pl.’s Resp. 4:19–22, ECF No. 22). In support of this conclusion, Plaintiff notes that he  
12 incurred \$117,069.30 in medical bills following the accident, which far exceeded the  
13 \$20,000.00 he received in compensation. (See *id.* 3:11–17). According to Plaintiff, this  
14 discrepancy shows that “Defendant’s basis for its denial of the claim is unreasonable on its face  
15 . . . .” (*Id.* 5:1–3).

16 Notwithstanding the above conclusory arguments of counsel, Plaintiff has failed to  
17 provide any admissible evidence to support his position that Defendant knowingly and  
18 unreasonably denied Plaintiff’s UIM claim. See *Barcamerica Int'l USA Tr. v. Tyfield Importers,*  
19 *Inc.*, 289 F.3d 589, 593 (9th Cir. 2002) (stating that “arguments and statements of counsel are  
20 not evidence and do not create issues of material fact capable of defeating an otherwise valid  
21 motion for summary judgment.”); see also *Smith v. Mack Trucks*, 505 F.2d 1248, 1249 (9th  
22 Cir.1974) (*per curiam*). For instance, Plaintiff indicates that he incurred total medical expenses  
23 of \$117,069.30 as a result of the accident, and yet Plaintiff fails to provide any records to  
24 substantiate this figure. At summary judgment, a party must go beyond mere assertions and  
25

1 provide competent evidence to show a genuine issue for trial. See *Celotex Corp.*, 477 U.S. at  
2 324.

3 Here, the uncontroverted evidence in the record shows that Defendant denied the claim  
4 based on numerous factors, including the seemingly minor nature of the accident and Dr.  
5 Schwarz’s medical report. (See Accident Photos, Ex. 3 to Def.’s MSJ, ECF No. 21-3); (Swartz  
6 Report, Ex. 7 to Def.’s MSJ). Plaintiff has failed to provide any competent evidence to bring  
7 into question the reasonableness of Defendant’s denial, much less demonstrate that Defendant  
8 acted with “knowledge or reckless disregard” for a lack of reasonableness. The Court therefore  
9 grants summary judgment in favor of Defendant on Plaintiff’s bad faith claim.

#### 10 **B. Violation of the Unfair Claims Practices Act**

11 Defendant argues that Plaintiff’s Unfair Claims Practices Act claim fails because  
12 Defendant “promptly communicated its position [that] Plaintiff was completely compensated  
13 by other benefits, which was supported by independent medical consulting and other available  
14 information.” (Def.’s MSJ 15:3–5). The Nevada Unfair Claims Practices Act, NRS 686A.310,  
15 concerns the manner in which an insurer handles an insured’s claim. *Zurich Am. Ins. Co. v.*  
16 *Coeur Rochester, Inc.*, 720 F. Supp. 2d 1223, 1236 (D. Nev. 2010). To establish a claim under  
17 NRS 686A.310, a plaintiff must show a violation of one of the statute’s sixteen enumerated  
18 activities that constitute unfair practice in the insurance context. See NRS 686A.310(1)(a)-(p).

19 In the Amended Complaint, Plaintiff fails to identify which provisions of NRS  
20 686A.310 Defendant allegedly violated. Rather, Plaintiff only includes broad legal  
21 conclusions, such as Defendant “failed to acknowledge and act reasonably promptly upon  
22 communications with respect to claims arising under insurance policies.” (See Am. Compl. ¶  
23 31). Similarly, in response to the instant Motion for Summary Judgment, Plaintiff merely states  
24 that he “proffers sufficient evidence to persuade a reasonable jury that Defendant ‘failed to pay  
25 Plaintiff benefits he was entitled to under the policy. . . .’” (Pl.’s Resp. 5:13–16). As noted

1 above, however, Plaintiff has failed to provide any admissible evidence to the Court. Thus,  
2 based upon a review of the uncontroverted evidence in the record, the Court finds that  
3 Defendant is entitled to summary judgment on this claim.

4 **C. Punitive Damages**

5 In Nevada, the award for punitive damages is governed by statute. See NRS 42.005.  
6 Punitive damages are designed to punish and deter a defendant's culpable conduct and act as a  
7 means for the community to express outrage and distaste for such conduct. Countrywide Home  
8 Loans, Inc. V. Thitchener, 124 Nev. Adv. Op. No. 64, P.3d 243 (2008). For punitive damages  
9 to be awarded, the conduct of the defendant must be oppressive, fraudulent, or malicious. NRS  
10 42.005. Both malice and oppression require a conscious disregard for a person's rights and  
11 "knowledge of the probable harmful consequences of a wrongful act and a willful and  
12 deliberate failure to act to avoid those consequences." Countrywide, 192 P.3d at 252.

13 Here, Plaintiff has failed to present any competent evidence to support a finding that  
14 Defendant's conduct was oppressive, fraudulent or malicious. The Court therefore strikes  
15 Plaintiff's request for punitive damages.

16 **IV. CONCLUSION**

17 **IT IS HEREBY ORDERED** that Defendant's Motion for Partial Summary Judgment,  
18 (ECF No. 21), is **GRANTED**. The Court grants Defendant summary judgment on Plaintiff's  
19 extra-contractual claims and strikes Plaintiff's request for punitive damages.

20 **IT IS FURTHER ORDERED** that the parties shall have thirty (30) days from the  
21 issuance of this order to file a Joint Pretrial Order on the remaining breach of contract claim.

22 **DATED** this 11 <sup>September</sup> day of [REDACTED], 2018.

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Gloria M. Navarro, Chief Judge  
United States District Judge